United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

8-22-77

77-7217

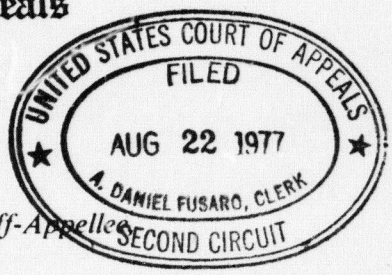
To be argued by
JAMES M. BERGEN

B/P/S

In The

United States Court of Appeals

For The Second Circuit



MAGNALEASING, INC.,
Plaintiff-Appellee,

-against-

STATEN ISLAND MALL, BLACKFRIARS REALTY CORP. and TOTTENHAM REALTY CORP.,
Defendants-Appellants.

REPLY BRIEF FOR DEFENDANTS-APPELLANTS

MARSHALL, BRATTER, GREENE, ALLISON & TUCKER
Attorneys for Defendants-Appellants Blackfriars Realty Corporation and Tottenham Realty Corporation, doing business as Staten Island Mall, a joint venture
430 Park Avenue
New York, New York 10022
(212) 421-7200

JAMES M. BERGEN
JEFFREY NEWMAN
Of Counsel

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Defendants-Appellants.

----------X

REPLY BRIEF FOR APPELLANTS STATEN ISLAND MALL, BLACKFRIARS REALTY CORPORATION AND TOTTENHAM REALTY CORPORATION

PRELIMINARY STATEMENT

This brief is submitted on behalf of Blackfriars Realty Corporation ("Blackfriars") and Tottenham Realty Corporation ("Tottenham"), doing business as Staten Island Mall, a joint venture ("Mall"), defendants-appellants herein, in reply to the answering brief of plaintiff-appellee Magnaleasing, Inc. ("Magnaleasing").

Plaintiff's answering brief parallels the flawed case Magnaleasing brings to this Court. On the law, it offers conclusory statements unsupported by the cases cited--and fails wholly to come to grips with

the critical legal arguments advanced by defendants. On the facts, it marshals the evidence in a way that highlights plaintiff's failure to prove its case at trial. In the end and in a concededly unintended fashion, it serves only to bolster defendants' contention that reversible error was committed below and that the judgment appealed from cannot stand.

ARGUMENT

POINT I

PLAINTIFF INTRODUCED NO EVIDENCE UPON WHICH A FINDING OF INTENT TO DECEIVE CAN BE SUSTAINED

Given the "clear and convincing" standard that this and every plaintiff in a fraud action must meet, analysis of the evidence proffered below is all important. And upon analysis, it can be seen that there was no evidence introduced that could sustain the trial court's finding that defendants intended to deceive--none that would satisfy a "preponderance of the evidence" test, none that would satisfy a "clear and convincing" test.*

Plaintiff concedes, as it must, that defendants' vice president, John Feist, projected Tax Rent and Common Area Charges at $1.00 and $.60 per square foot per year, respectively. Defendants concede, as they must, that as and after these projections were made, two Feist & Feist ("Feist") employees made higher projections. Plaintiff argues (Brief for Appellee Magnaleasing, Inc. ["Plaintiff's Brief"] at 35-6) and the trial court found that John Feist did not honestly believe his own

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* Defendants reiterate their contention that given the inactionable nature of the representations alleged and the unjustifiable reliance thereon by Magnaleasing, the amended complaint should have been dismissed as a matter of law at the close of plaintiff's case. See, Point II of Brief for Appellants Staten Island Mall, Blackfriars Realty Corporation and Tottenham Realty Corporation ("Defendants' Brief") and Point II, infra.

projections.* Neither argument nor finding is supported by evidence.

Magnaleasing does not purport to have introduced direct evidence tending to negate John Feist's belief in the currency of his projections. Indeed, the only such direct evidence came from Mr. Feist himself, who testified that he did so believe. See, e.g, A. 72-3, 101, 106-08. Instead, it asked the trial court to infer John Feist's disbelief from three principal and disparate bits of circumstantial evidence: the existence of higher projections by the two Feist subordinates; a December 15, 1972 memo (PX 11 at E 75) from John Feist to Irving Feist; and a comparison with an adjacent Korvettes shopping center. The trial court drew the inference sought by plaintiff and it did so impermissibly.

A. The higher projections by two Feist subordinates

Plaintiff introduced a series of documents setting forth alternative projections as to Tax Rent and Common Area Charges. See, PX 9 at E 62; PX 10 at E 68; PX 13 at E 77; PX 14 at E 82; PX 17 at E 213; PX 18 at 218. These alternative projections had been made by two Feist subordinates: Ed Fraher, who headed Feist's construction department (A. 74), and Donald Faughnan, who was Feist's controller (A. 156). Fraher made projections of Tax Rent (A. 100-01; PX 11 at E 75; PX 13 at E 78); Faughnan made projections of Common Area Charges (A. 156, 158). As noted above, the projections of both men were higher than those of

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* Plaintiff introduced no evidence - and there was none - that John Feist or anyone else at Feist & Feist knew what future Tax Rent and Common Area Charges would be. Rather, plaintiff premises its claims on what John Feist is said to have believed future such charges would be.

John Feist, Feist's vice president. The only legitimate basis for inferring that John Feist, in the face of these higher projections, did not in fact believe his own would have been for plaintiff to show that John Feist should have believed the alternative projections, i.e., that they were worthier of belief. Yet plaintiff introduced no evidence whatever that as of the time they were made, these higher projections were worthier of belief that John Feist's own; if anything, it introduced evidence to the contrary.

Magnaleasing contends (Plaintiff's Brief at 27), for example, that these higher projections were based on "hard data", yet it offered no evidence of such data or even whether Faughnan and Fraher looked to any data at all. It introduced no evidence of the assumptions these men held, no evidence of the calculations they made, no evidence of the methodology they used. In short, the record nowhere discloses how Fraher and Faughnan arrived at the projections they did.

Nor did plaintiff purport to offer evidence of the competence of the two Feist employees to make such projections. As Feist's construction man, Fraher had a "hard hat" job unrelated to the prediction of real estate taxes. Similarly, Faughnan's "primary responsibility" as controller (A. 156) had nothing to do with the projection of Common Area Charges; rather, he maintained accounting records and assembled financial information relating to the current operations of Feist's ongoing (and unrelated) business. Id. Plaintiff introduced no evidence of any training Fraher

and Faughnan may have had to make such projections and no evidence, for that matter, that Fraher and Faughnan had ever previously made any such projections.*

In sum, these alternative, higher projections, by which the trial court found John Feist to have been "surrounded" (A. 43a, 45a), were not shown by plaintiff to have been more than the fruits of naked guesswork by two Feist subordinates. They were not shown to have been worthy of belief -- certainly not so worthy as to permit the trial court's inference that John Feist believed them and not his own.

Note: Plaintiff appears to argue alternatively that defendants' "true estimates" (Plaintiff's Brief at 11; see also, id. at 24-5) were the projections made by Fraher and Faughnan and not those of John Feist. Of the former, higher projections, plaintiff contends that they "were used by Feist & Feist in planning its operation and management of the Mall." Id. at 27. Plaintiff cites nowhere to the record, for the record contains not a scrap of evidence that anyone within Feist used these projections

---

* And as shown previously (Defendants' Brief at 44-5), Faughnan himself conceded (PX 9 at E 62) that the projections made by him and Fraher forecast "vastly" higher expenses than were then being incurred at comparable regional shopping centers in the northeastern United States.

in any way for any purpose. Magnaleasing's follow-up contention -- that defendants "had no other estimates" (id.) -- is equally spurious; plaintiff cites to that portion of the transcript (A. 97) where John Feist specifically reiterated his testimony that defendants did have other estimates, namely his own.

Indeed, it seems disingenuous at best for Magnaleasing to argue on the one hand that John Feist, as vice president of defendants Blackfriars and Tottenham as well as of Feist, was "primarily responsible for [the Mall's] operation and maintenance" and on the other hand that the projections of two corporate subordinates constituted defendants' "true estimates" while Mr. Feist's did not. Compare, Plaintiff's Brief 4 with 24-5.*

B. John Feist's December 15, 1972 memo

Plaintiff's second asserted basis for drawing an inference that John Feist intended to deceive rests on a selective and distorted reading of PX 11 (E 75). Plaintiff attempts to cast a sinister light

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* Moving beyond disingenuousness, Magnaleasing contends in passing (Plaintiff's Brief at 19; see also, id. at 35) that while conveying to his leasing staff a $.60 per square foot estimate, John Feist "admitted that his estimate of [C]ommon [A]rea [C]harges was over $2.00 per square foot." (emphasis added) This is arrant nonsense and plaintiff knows as much, for it cites to that portion of the transcript (A. 133) where John Feist was describing not "his" estimate but Don Faughnan's estimate as embodied in PX 17 (E 213-17).

over that document, a December 15, 1972 memo from John Feist to Irving Feist, by quoting and paraphrasing as follows:

> John Feist knew at that time that "we're certainly going to have problems with our tenants" when they discovered the true facts. Plaintiff's Brief at 35; see also, id. at 12.

In truth, the memo says no such thing. Indeed, written nearly two weeks after the parties' December 4 negotiating session, the memo is contemporaneous, documentary evidence that John Feist genuinely believed the $1.00 Tax Rent projection earlier passed on to Magnaleasing. The text of the memo is unambiguous and is set forth in full:

> Ed Fraher told me the other day that he figures the tenants' share of the taxes at Staten Island Mall for the opening year to be $2.34 per square foot.
>
> This is something I've never heard of--we always talked about $1.00 or $1.25. If we're going to have taxes like this (in addition to the Common Area and everything else), we're certainly going to have problems with our tenants. [Emphasis added]

In short, PX 11 not only fails to support the inference drawn by the trial court; it conclusively negates it.

C. The Korvettes shopping center comparison

Plaintiff's final suggested basis for inferring an intent to deceive is perhaps the most spurious of all. John Feist testified (A. 103, 107) that he had derived his Tax Rent projections in part by extrapolating from the real estate taxes levied on the Korvettes shopping center that is adjacent to the Mall. Apparently seeking to discredit his testimony, plaintiff compares (Brief at 36) the Korvettes 1972-1973 assessment of $6,916,500 (A. 152) with Ed Fraher's projection of a $19 million assessment for the Shopping Center (PX 18 at E 224) and concludes cryptically (Plaintiff's Brief at 36) that in light of the disparity, John Feist should have "tripled" his Tax Rent projection. This argument is specious in the extreme, for had John Feist believed Fraher's projection, he would not have had to compare it with anything; he would have adopted it as his own. Obviously, he did not believe Fraher's projection -- as shown above and as shown at trial.

Insofar as the trial court focused on the differences between the two shopping centers (A. 43a-44a), John Feist clearly allowed for such differences, forecasting 66% to 100% greater taxes for the Mall than had been levied on the Korvettes center.*

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* John Feist's $1.00-$1.25 projection of the Tax Rent for Mall tenants (PX 11 at E 75; A. 171) had, of course, been in addition to the $.25 per square foot it was always understood that defendants would (and did) themselves pay. See, e.g., PX 15 at E 119; PX 23 at E 240. Thus, Mr. Feist's forecast of all such taxes was $1.25-$1.50 per square foot, i.e., up to twice the $.75-$.80 per square foot in taxes levied on the Korvettes center (PX 12 at E 76).

D. John Feist's credibility

With plaintiff's evidence incapable of sustaining the inference of intent to deceive, the trial court's finding may be seen to rest ultimately -- and impermissibly -- on a rejection of John Feist's testimony. Indeed, both the trial court and Magnaleasing laid great stress on Mr. Feist's alleged lack of credibility. See, A. 44a-45a; Plaintiff's Brief at 18-20, 36. Yet there are few clearer principles than that the trial court's disbelief of a witness' testimony may not support an affirmative finding that the reverse is true; that is, such disbelief cannot supply a want of proof. See, e.g., Nishikawa v. Dulles, 356 U.S. 129, 137 (1958); Moore v. Chesapeake & O. Ry. Co., 340 U.S. 573, 576 (1951); Collman v. Commissioner of Internal Revenue, 511 F.2d 1263, 1268 (9th Cir. 1975); Seymour v. Oceanic Navigating Co., Ltd., 453 F.2d 1185, 1191 (5th Cir. 1972); Bankers Life and Casualty Company v. Guarantee Reserve Life Insurance Company of Hammond, 365 F.2d 28,34 (7th Cir. 1966). The rationale that underlies such a principle is self-evident. "Were the rule otherwise a case could be made for any proposition in the world by the simple process of calling one's adversary to the stand and arguing to the jury that he was not to be believed." Janigan v. Taylor, 344 F.2d 781, 784-85 (lst Cir. 1965).

This is, of course, exactly what Magnaleasing did in the case at bar. It called John Feist, defendants' vice president, to the stand. It elicited his denials of an intention to deceive. It belittled these

denials to the trial court, supplementing its argument with references to circumstantial "evidence" that, upon analysis, proved nothing. It obtained the desired finding from the trial court, a finding that, in the end, can be seen as based on no evidence at all. In short, plaintiff utterly failed to prove its case.*

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* Insofar as the trial court found that defendants intended to deceive with respect to the representation as to leasing (A. 40a), that finding too followed a failure of proof on plaintiff's part. Defendants had contended, and still do, that the subject representation was not false at all, since in a meaningful sense, leasing had exceeded fifty percent. See, Defendants' Brief at 52-55. However that issue is resolved, defendants offered uncontroverted evidence that they considered leasing to have surpassed the fifty percent mark. See, id. and testimony reviewed therein. Such evidence conclusively negates the inference urged upon and adopted by the trial court, viz., that defendants intended to deceive.

POINT II

PLAINTIFF'S COMPLAINT SHOULD HAVE BEEN DISMISSED AS A MATTER OF LAW

In light of the allegations made and the proof adduced, the complaint should have been dismissed at the close of plaintiff's case. The trial court's refusal to dismiss constituted a misapplication of New York law -- and reversible error. Magnaleasing's arguments to the contrary are belied by two glaring faults: a failure to confront dispositive case law; reliance on incompetent evidence, demonstrably inaccurate.*

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* To the extent that Magnaleasing implies a restriction on this Court's power or duty to review the trial court's reading of New York law (Plaintiff's Brief at 22), such implication is ill-founded. "[T]he courts of appeals sit to require trial court adherence to Erie principles as well as other principles of federal law, and when it appears manifest that the law as applied below is not in compliance with the state law as read by the court of appeals, that court should reverse the decision." 1A Pt. 2 Moore's Federal Practice ¶0.309[2], 1976-77 Cumulative Supplement at 132. To do otherwise would be to effectively deny appellate review in a substantial number of diversity cases. Ward v. Hobart Manufacturing Company, 450 F.2d 1176, 1180 n.5 (5th Cir. 1971). And consonant with the appellate courts' duty to ascertain and apply controlling state law, Huddleston v. Dwyer, 322 U.S. 232, 236 (1944), this Court has not hesitated to engage in a searching review of applicable New York law and to reverse where it found the trial court to have misread such law. See, e.g., Modave v. Long Island Jewish Medical Center, 501 F.2d 1065 (2d Cir. 1974); Calvert v. Katy Taxi, Inc., 413 F.2d 841 (2d Cir. 1969).

A. The representations as to Tax Rent and Common Area Charges

Given the nature of the representations invoked - predictions of costs yet to be incurred - defendants had discussed (Brief at 19-24) the long line of New York cases that deem such predictions inactionable as a matter of law. The culmination of such authority is, of course, Romance Bridals, Inc. v. 1385 Broadway Co., "New York Law Journal," January 27, 1976, at 6 (Sup. Ct. N.Y. Co.). As shown in Defendants' Brief (at 22-23), Romance Bridals is not distinguishable from the case at bar. That fraud complaint was dismissed on motion. This fraud complaint was permitted to sustain a massive damages award against defendants.

Plaintiff would have this Court affirm the result below, even as it concedes the efficacy of Romance Bridals. For Magnaleasing nowhere disputes the holding in that case; incredibly and without discussion, it argues (Plaintiff's Brief at 29) that Romance Bridals is inapplicable. It is not only applicable, it is dispositive. It states the law of New York. The trial court's decision in Magnaleasing does not.*

As to the cases principally invoked by Magnaleasing (Plaintiff's Brief at 23-24), none bears even marginally on the precise question before the Court: Whether a misstatement of one's prediction as to

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* Judge MacMahon's decision neither cites nor discusses Romance Bridals, although defendants had briefed the case to the trial court.

things that are not known can be actionable in fraud? Defendants' authorities stand unrefuted; such predictions are not actionable. See, Channel Master Corporation v. Aluminum Limited Sales, Inc., 4 N.Y.2d 403, 407, 176 N.Y.S.2d 259, 262 (1958); Irving Trust Company v. La Pilar Realty Inc., ___A.D.2d ___, 391 N.Y.S.2d 131, 132 (1st Dept. 1977); Lanzi v. Brooks, 54 A.D.2d 1057, 388 N.Y.S.2d 946, 949 (3rd Dept. 1976); Bailey v. Diamond International Corporation, 47 A.D.2d 363, 367 N.Y.S.2d 107, 110 (3rd Dept. 1975); Puro v. Zimmerman, ___ Misc.2d ___, ___N.Y.S.2d ___, "New York Law Journal," April 18, 1977, at 14 (Sup. Ct. N.Y. Co.); Romance Bridals, Inc. v. 1385 Broadway Co., supra.

Plaintiff reiterates (Brief at 22) the trial court's observation (A. 42a) that "[t]he expression of an opinion or prediction which the declarant does not himself believe is a false statement of fact." Literally taken, this observation is sound. To conclude, however, that such a "false statement of fact" is actionable is incorrect, however, and in a classic English holding, Lord Justice Bowen explained why:

> In a case where the facts are equally well known to both parties, what one of them says to the other is frequently nothing but an expression of opinion. The statement of such opinion is in a sense a statement of fact, about the condition of the man's own mind, but only of an irrelevant fact, for it is of no consequence what the opinion is. Smith v. Land and House Property Corporation, 28 Ch. D. 7, 15 (1884) (emphasis added)

And upon reflection, the Lord Justice's explanation must be seen as definitive; were the rule otherwise, there would be nothing left to the

general principle that predictions may not form the basis for an action for fraud. And at least nominally, even Judge MacMahon acknowledged (A. 41a) the continuing vitality of this principle.

The trial court's effort (A. 42a) to take this case out of the general rule must be seen as reversible error. Judge MacMahon concluded (id.) that since only defendants could have known the estimated cost of constructing the Mall, only defendants could "form an opinion" as to future Tax Rent and Common Area Charges and plaintiff could justifiably have relied on defendants' projections. The fallacy of such a conclusion is its assumption that there is a predictable relationship between the cost of developing commercial property and the taxes and operating expenses that will eventually be levied and incurred thereon. That fallacy, discussed in Defendants' Brief at 31-2, was first brought out by the trial court itself. Plaintiff's counsel had argued (A. 355), in effect, that known costs yield known value:

> THE COURT: That is the land as you value it. The assessor may have a totally different idea — he frequently does, and that is why you have certiorari proceedings.
>
> MR. BUTLER: That is true, your Honor, but these people are experts. They represented themselves as experts in this area. [*]

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* In fact, there is nothing in the record to show that defendants held themselves out as experts in the forecasting of Additional Rent charges.

THE COURT: Yes, but you were certainly experts as well, and you knew that the City of New York could disagree totally with any valuation that these people put on it or that you put on it.

MR. BUTLER: That is true, I have no argument with that, Your Honor. Id. (emphasis added)

A few minutes later, the trial court further highlighted the speciousness of Magnaleasing's argument, repeated herein (Plaintiff's Brief at 25), that defendants had "superior knowledge":

MR. BUTLER: We have here a situation where they have expertise--

THE COURT: And so do you.

MR. BUTLER: -- and special knowledge.

THE COURT. So do you. You have Kelly here — he is a lawyer, John Kelly. He has had years of experience in the real estate business. He has rented stores in malls for chains and for your client. He is no babe in the woods; your client is no babe in the woods. Any of these figures about what Korvettes' taxes are are as available to you as they are to Feist. Any of these figures that are in public records are all available to you and presumably you are watching out for yourselves. (A. 358)

Significantly, at least two other decisions (even apart from Romance Bridals) have adopted defendants' contention herein: that predictions of such costs as real estate taxes are not actionable and that reliance on such predictions is not justifiable. In 3700 S. Kedzie Building Corporation v. Chicago Steel Foundry Co., 20 Ill. App. 2d 483, 156 N.E.2d 618 (App. Ct. 1959), the buyer of commercial property sought damages, claiming

that the seller had fraudulently underestimated prospective real estate taxes. Indeed, the buyer alleged what Magnaleasing has not: that the defendant "well knew" what the future real estate taxes would be. The appellate court affirmed the lower court's dismissal of the suit on motion. It found that the taxes ultimately levied "were not determinable in amount at the time the sale was consummated," 156 N.E.2d at 620, and that defendant's representations were inactionable predictions:

> 'The board of review and board of assessors had the right to change the assessment from year to year. [citing cases] Appellants were charged with knowledge that the board of review had this right, and they were not justified in relying on any statement appellees might have made with reference to what the taxes might be in any year subsequent to the contract.' Id. (emphasis added)

In Holder v. Home Savings & Loan Association of Los Angeles, 267 Cal. App.2d 91, 72 Cal. Rptr. 704 (Ct. App. 1968), a California appellate court affirmed the lower court's dismissal of a comparable fraud claim brought by residential home buyers. It framed the issue in terms identical to the one that confronts this Court: "MAY RELIANCE BE PLACED UPON REPRESENTATIONS WITH REGARD TO TAXES TO BE LEVIED IN FUTURE?" 72 Cal. Rptr. at 714. Citing 3700 S. Kedzie, it deemed such reliance unjustifiable as a matter of law:

> The rule is different as to statements with regard to future assessments or levies of taxes. The fixing of assessed values of property and of tax rates is solely within the power of public officials, whose decisions are not and should not be subject to control by a property owner, so that

representations made by a private person as to such matters may not justifiably be relied on. 72 Cal. Rptr. at 714-15.

Although of course not binding, 3700 S. Kedzie and Holder constitute persuasive authority for the proposition that New York law is and would be what Romance Bridals and its progeny declare it to be: a stark refutation of the law as enunciated by the trial court in the case at bar.*

B. The representation as to leasing

Defendants had contended (Brief at 34-40) that in light of leasing plans (PX 20 and 21) displayed to plaintiff's representatives and showing clearly only 24.2% of the space to have been leased, Magnaleasing cannot justifiably have relied on an earlier representation (A. 8a at ¶10(b)) that leasing had exceeded 50%. In response, plaintiff does not

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* As to the representation concerning Common Area Charges, Magnaleasing persists in its contention (Plaintiff's Brief at 39-40) that the "$.60 clause" in the Lease (§ 5.3B, PX 15 at E 126-27) embodies the projection described as actionable in plaintiff's amended complaint (¶10(d), at A. 8a). If so, plaintiff's claim is demonstrably without merit. As shown earlier, that clause purported to do no more than fix an interim billing rate for initial Common Area Charges. See, Defendants' Brief at 51-2. In accordance with that same clause, Magnaleasing was to be and was eventually billed for the difference between the interim $.60 figure and plaintiff's pro rata share of the actual Common Area Charges as later computed. This "back-billing," as Magnaleasing describes it (A. 254), was fully authorized by the Lease, and Kelly so acknowledged at trial (A. 256).

dispute that the plans show only 24.2% leased; rather, it offers (Plaintiff's Brief at 32-3) selective testimony from Dale and John Kelly, which testimony arguably supports the proposition that both Kellys misread the plans laid literally in front of their faces.*

Had plaintiff's arguments gone no further, the matter would be simple enough. In the face of plans definitively showing 24.2% leased, plaintiff could not have justifiably relied on a prior representation of 50% leased, and the trial court's conclusion to the contrary is reversible error. Jerrose Management Corp. v. Garnett, 33 Misc.2d 307, 226 N.Y.S.2d 503, 506-07 (Sup. Ct. N.Y. Co. 1962).**

But plaintiff did not stop there. It attacks defendants' plans as "probably the most fraudulent documents of all," as "blatantly false

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* As shown earlier (Defendants' Brief at 36-40), neither Kelly testified that defendants' representative had explained the meaning of the printed names or had in any way misled them. The Kellys' erroneous reading of the plans, later blamed on defendants, was seized upon by the trial court, which mistakenly found (A. 37a) that the plans showed more than 60% of the available space as leased.

** In Jerrose, the purchaser of commercial property sued to rescind the transaction, claiming the seller to have fraudulently represented that only 3 feet of excavation work would be necessary whereas in fact 10 feet of excavation was required. The court dismissed the suit on motion after learning that plans showing 10 feet of necessary excavation work had been displayed to plaintiff prior to the closing:

> Thus, even assuming that the alleged oral representation as to the "usual" number of feet, or 3 feet, had been made by defendant -- which is incredible in view of the fact that the set of plans brought to the contract negotiations by defendant clearly showed that excavation was planned for a depth of
>
> (Cont'd)

documents," as "an integral part of Kirtland's fraudulent presentation" and as "false and misleading...." (Plaintiff's Brief at 7, 31 and 35; see also, id. at 52). It contends that these plans "contain[ed] numerous names of non-existent tenants" (id. at 10), that they were "imprinted with the names of nonexistent tenants" (id. at 52), that "[m]any supposed tenants never rented space" (id. at 7), and that:

> On the second floor alone, printed on the leasing plans, were the names of the following ten stores which never leased space at the Mall:
>
> | Store No. | Name |
> |---|---|
> | 231 | Burt Lancaster Health Food |
> | 232 | Universal Spa |
> | 234 | Dannemann's Fabric |
> | 235A | Unisex Hair Stylist |
> | 250A | Kerns Piano |
> | 221 | Montgomery Grant Camera |
> | 221A | Lady Madonna |

(Cont'd)

about 10 feet -- plaintiff is not permitted to claim that it relied thereon. The well-settled rule is that where "*** the other party has the means available to him of knowing, by the exercise of ordinary intelligence, the truth, or the real quality of the subject of the representation, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations". (Schumaker v. Mather, 133 N.Y. 590, 596, 30 N.E. 755, 757; see, also, Sylvester v. Bernstein, 283 App. Div. 333, 127 N.Y.S.2d 746, affd. 307 N.Y. 778, 121 N.E.2d 616). 226 N.Y.S.2d at 506-07.

Store No.	Name
119	Fashion Optical
226A	Bridal Traditions
235	Possibilities

id.; see also, id. at 31.

This argument must be seen for what it is: an after-the-fact "smokescreen" thrown up by plaintiff in an unsubtle (and unfounded) effort to refute what the leasing plans should have revealed to both Kellys had they bothered to read them carefully - that only 24.2% of the Mall was leased as of October 18, 1972. While, as shown below, it is legally irrelevant, this argument does reveal the ultimate incompetence and untrustworthiness of PX 7, a document upon which the trial court based its finding of fraud as to the representation on leasing. And it demonstrates, in the end, the lengths to which plaintiff would go in its attempt to shore up a case without foundation.

Plaintiff's accusation as to defendants' leasing plans is demonstrably an afterthought. It was not alleged in the complaint nor in the amended complaint. It did not come up during trial nor during closing arguments. It was not discussed in the trial court's decision, and Judge MacMahon made no findings, formal or informal, with respect thereto.

Indeed, plaintiff first raised the accusation in a way that precluded effective response from defendants. It advanced the contention, identical in substance to that made therein, in its Post-Trial Brief at page 8. To defendants' answer that such accusation was without support in the record (Defendants' Post-Trial Memorandum, at 22), plaintiff elaborated in an unauthorized Post-Trial Reply Brief. It pointed in that Reply Brief (at page 3) to PX 7 (E 53 - E 59), which it described as a "compilation of all leases signed through 1975" and argued that since the names listed (which were taken from the printed names on PX 20) do not appear on PX 7, they did not lease space at the Mall. It points this Court to PX 7 as well. (Plaintiff's Brief at 7).

Even at face value, plaintiff's contention may be seen as baseless. For of the 10 named parties listed in Plaintiff's Brief (at 7) and printed on PX 20 (the second floor leasing plan), 9 were never said by defendants to have leased space in the first place. Only Possibilities (Store No. 235) is fitted with a large black dot on PX 20, and as shown earlier it was only the spaces so fitted that the leasing plans designated as leased. For all the record reveals, the stores with printed names but no black dots could have represented defendants' conception of suitable tenants or prospective tenants with whom negotiations were underway -- or both. In either event, the plans (PX 20 and 21) did not denominate them as having leased space.

Beyond the surface of the accusation, however, plaintiff's contention reveals a more disquieting truth: PX 7, plaintiff's supposed compilation of tenants who leased through 1975, is demonstrably incompetent evidence, inherently suspect and simply inaccurate.

Initially, PX 7 is rendered suspect by its omission of two Mall tenants: Brown Retail Development Company and Rock-Landau Mall, Inc., which signed their leases on August 30, 1972 and August 30, 1973, respectively. This Court may take judicial notice of the fact that both such tenants have sued Mall in New York Supreme Court and that both are represented by the same attorneys who represent Magnaleasing herein.* There is hardly anyone in a better position to know that PX 7 is inaccurate in this respect than plaintiff's attorneys.

As if this discrepancy were not itself enough to discredit PX 7 — and to cast doubt on all the inferences drawn therefrom -- the exhibit itself is inherently unworthy of belief. In response to the trial court's speculation as to the source of the information contained in PX 7 -- "that somebody took it from something and compiled a list"

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* The lawsuit referred to is Merolo's (Elegance), Inc., et al. v. Staten Island Mall, et al. (Supreme Court, Richmond County - Index No. 1502/76), as set forth on the Civil Appeal Pre-Argument Statement, dated May 6, 1977, previously filed by defendants herein. For the convenience of the Court, the full caption of this lawsuit is annexed hereto as Exhibit A.

(A. 63) -- plaintiff's counsel said (id.) he would put a witness on the stand and lay a foundation. He never did. The record is wholly bereft of any information as to how the list was compiled. Apart from trial counsel's unsworn statement (id.) that "[w]e have done it ourselves," only one thing is known of PX 7: It is inaccurate, for it omits still other tenants who signed leases with Mall. As such, it is of no probative value and is entitled to no weight. Cf., Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 488 (1951); Fleischer v. Commissioner of Internal Revenue, 403 F.2d 403, 406 (2d Cir. 1968).

Had plaintiff charged at trial that the leasing plans were "an integral part of Kirtland's fraudulent presentation," etc., defendants would then have had the opportunity to respond - and to prove the extent to which PX 7 is inaccurate and incomplete beyond what has been demonstrated above. For as to the 10 "non-existent" tenants that plaintiff claims to have been shown on defendants' leasing plan, defendants could have proved that fully 4 did sign leases, and this Court may take judicial notice of the leases themselves, which will be made available at oral argument. To the extent PX 7 "proves" to the contrary, it is erroneous on its face. These four tenants are Possibilities (the one store cited that was fitted with a black dot), Unisex Hair Stylist, Fashion Optical, and Kerns Piano.

The implications of plaintiff's having relied on an unworthy PX 7 go beyond the "smokescreen" raised about defendants' leasing plans. They disprove that accusation, of course. But they also put in immediate doubt the trial court's finding (A. 38a) that only 32% of the available space was leased as of December 4, 1972, a premise upon which rests the conclusion that defendants misrepresented the rate of leasing itself. In the end and as noted above, Magnaleasing's ill-fated use of such dubious "evidence" signals the latent weakness in plaintiff's very case.

CONCLUSION

For the reasons stated above and in defendants' principal brief, the judgment awarding Magnaleasing damages of $156,766.99 against defendants and rescinding Magnaleasing's lease with defendants should be reversed and plaintiff's claims should be dismissed in all respects.

Dated: New York, New York
August 22, 1977

Respectfully submitted,

MARSHALL, BRATTER, GREENE,
ALLISON & TUCKER
Attorneys for Defendants-Appellants
Blackfriars Realty Corporation
and Tottenham Realty Corporation,
doing business as Staten Island
Mall, a joint venture
430 Park Avenue
New York, New York 10022
(212) 421-7200

Of Counsel:

James M. Bergen
Jeffrey Newman

EXHIBIT A

The full caption of the action entitled Merolo's (Elegance), Inc., et al. v. Staten Island Mall, et al., discussed, supra, at 23, and set forth on defendants' Civil Appeal Pre-Argument Statement, dated May 6, 1977, is as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND
----------x

MEROLO'S (ELEGANCE) INC., ANIMALS & THINGS, INC., DeSIMONE TRAVEL AGENCY, INC., CONCOCTIONS LTD., MURRAY GOFF, ROAMAN'S STATEN ISLAND, INC., VERRAZZANO RESTAURANT ON THE MALL, INC., JO-ANN ENTERPRISES, INC., ROCK-LANDAU MALL, INC., HOBBY-CRAFTS, INC., EDWARD ARKING, INC., ASIA CRAFTSMEN, INC., EAST RIVER SAVINGS BANK, CHEMICAL BANK, as successor in interest to Security National Bank, MORSE SHOE, INC., BENHIL SHIRT SHOPS, INC., STATEN ISLAND FOXMOOR, INC., STATEN ISLAND CVS, INC., STATEN ISLAND CHESS KING, INC., MELVILLE REALTY COMPANY, INC., MELCRAFT STATEN ISLAND, INC., GIFT SHOP AT THE MALL, INC., SPENCER GIFTS, INC., CHURCHILL STEREO CORP., WALDEN BOOK COMPANY, INC., HOUSE OF FABRICS OF NEW YORK, INC., BROWN RETAIL DEVELOPMENT COMPANY, MARPATKEN, INC., and CITY STORES COMPANY (INC.),

Plaintiffs,

- against -

STATEN ISLAND MALL, BLACKFRIARS REALTY CORP., TOTTENHAM REALTY CORP., FEIST & FEIST, JOHN P. CONNORS, RECEIVER FOR STATEN ISLAND MALL, ADAM C. HECK AS PRESIDENT OF CHASE MANHATTAN MORTGAGE AND REALTY TRUST, JOHN FEIST, IRVING FEIST and LAWRENCE EISENBERG,

Defendants.

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Index No. 1506/76

A 202 Affidavit of Personal Service of Papers — LUTZ APPELLATE PRINTERS, INC.

COURT OF APPEALS
SECOND CIRCUIT

MAGNALEASING, INC,
Plaintiff-Appellee,

- against -

STATEN ISLAND MALL, BLACKFRIARS REALTY CORP. & TOTTENHAM REALTY CORP.,
Defendants-Appellants.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF *ss.:*

I, James A. Steele *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 112 West 136th Street; New York, New York

That on the 22nd *day of* August, *19* 77 *at* 200 Park Avenue New York, New York

deponent served the annexed Reply Brief *upon* Keane & Butler, Esqs.

the *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* *herein,*

Sworn to before me, this 22nd *day of* August, *19* 77

James A. Steele

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1979